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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1943.

No. 545

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

Petitioners,

VS.

THE A. S. ABELL COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, MOTION TO PROCEED ON TYPEWRITTEN RECORD, AND BRIEF IN SUPPORT OF PETITION.

I. DUKE AVNET,
WM. TAFT FELDMAN,
Attorneys for Petitioners.

The Daily Record Co. Print, Baltimore.

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PETITION FOR WRIT OF CERTIORARI.

The petitioners, Fred Schroepfer, Charles R. Schroepfer and Abraham Berry, respectfully petition this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE MATTER INVOLVED.

This case involves an important question of coverage under the Fair Labor Standards Act of 1938, 29 U. S. C., Sec. 201 ff., and particularly as it applies to those employees of a large metropolitan newspaper who are en-

gaged in the local distribution of its papers. Respondent is the publisher of the Baltimore Sunpapers. The facts as to respondent's interstate business briefly summarized are these: respondent receives news flashes from all over the world as well as numerous syndicated columns and other national features, advertising is solicited outside the state, raw materials used in the publication of the newspapers are derived principally from outside the state, parts of the paper (such as the Sunday rotogravure section and the magazine section) are received from without the State already printed and ready for circulation, and about 7% of its distribution is outside of the State of Maryland. Its local distribution of papers during the period involved in this proceeding was carried through three main channels: carrier delivery; sale through news stands and newspaper counters in stores, hotels, depots, etc.; and sale through "racks" or street corner receptacles in which the papers were placed and subsequently removed by the purchaser who paid for them by leaving his pennies in the attached coin box. In the latter two methods of distribution respondent made use of the so-called "rackmen" whose duties included delivering papers to the stores and to the racks. In the discharge of these duties each rackman needed a helper who was selected by the rackman and received his compensation directly from him. Respondent knew that in the service of the racks the rackmen needed and had helpers. Petitioners Fred Schroepfer and Charles R. Schroepfer were rackmen and in this proceeding they sought recovery of unpaid overtime compensation; and petitioner Abraham Berry acted as a rackman's helper to the Schroepfers and he sought recovery of both unpaid minimum wages and overtime compensation.

The District Court of the United States for the District of Maryland, sitting as a jury, decided that petitioners, Fred and Charles Schroepfer, were not employees of the respondent but were independent contractors. It also held that petitioner Berry in his work as helper was not an employee of the respondent but was the employee of the other petitioners. Finally, the District Court held that although the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, the petitioners were not engaged in interstate commerce.

The Circuit Court of Appeals for the Fourth Circuit affirmed the lower Court on the sole ground that the petitioners were not engaged in commerce within the meaning of the Act. The Circuit Court of Appeals made no finding on the question of whether petitioners were employees of respondent.

If, as petitioners contend, their work was in interstate commerce then the question of whether they were employees under the Fair Labor Standards Act will also have to be determined by this Court.

THIS COURT HAS JURISDICTION.

This Court has jurisdiction under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals decided this case on September 16, 1943, and its mandate issued on October 18, 1943.

THE QUESTIONS PRESENTED.

1. Were the rackmen and their helpers who distributed newspapers of the respondent to stores and racks in Baltimore City engaged in interstate com-

merce within the meaning of the Fair Labor Standards Act?

2. Were the petitioners employees of respondent within the meaning of the Act?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

In the present case the Circuit Court of Appeals decided "a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38 (5) (b)). Two guides to decision exist in the precedents of this Court. In *Overstreet v. North Shore Corporation*, 318 U. S. 125, the test laid down is whether the work of the employees "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' . . . and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act". In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, the test to determine whether an employee, engaged in local distribution of goods imported from without the State by a wholesaler, is within the coverage of the Act, depends upon a finding that "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." As we shall show in our supporting brief, if a realistic appraisal of respondent's business and petitioners' relation to it is made, petitioners' activity satisfies the tests set up in both the *Overstreet* and *Jacksonville* cases.

With regard to the issue of whether the employer-employee relationship existed in this case "an important question of federal law which has not been but should be settled by this court" (Supreme Court Rule 38 (5) (b)), is presented. For this question involves the proper

interpretation to be given the statutory language contained in Sec. 3(g) of the Fair Labor Standards Act "that 'employ' includes to suffer or permit to work"; and in the absence of a final ruling by this Court, the Congressional intent cannot be definitely ascertained. Moreover, if this critical language of the statute is restricted to cover only those who are employees at common law, as held in the opinion of the District Court, the benefits of the Act will be withdrawn from large groups of workmen to whom Congress undoubtedly intended such benefits to apply.

The failure of the Circuit Court of Appeals to pass upon this question should not interfere with its consideration by this Court. We believe that this Court has already shown that it regards the definition of the employer-employee relationship under social legislation of prime importance. For at this time there are pending in this Court the related cases of *National Labor Relations Board v. Hearst Publications, et al.* (Nos. 336-339, Oct. Term, 1943), involving substantially the same question under the National Labor Relations Act as is presented in this case under the Fair Labor Standards Act. It is noteworthy that the language employed in the definition of the employment relation is more restricted in the National Labor Relations Act than in the Fair Labor Standards Act, and it would seem to be at least equally important that the scope of the coverage under the latter Act, as under the former one, should be settled by this Court.

Respectfully submitted,

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